UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 429 and
NASHVILLE ELECTRICAL JOINT
APPRENTICESHIP TRAINING COMMITTEE (JATC)
(ELEC-TECH ELECTRICAL SERVICES)

and Case 26-CB-4240

DANNY PAGE, an Individual

ON REMAND FROM THE U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NASHVILLE ELECTRICAL JOINT APPRENTICESHIP TRAINING COMMITTEE'S SUPPLEMENTAL POSITION STATEMENT TO THE BOARD ON REMAND

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Introduction

This case is before the Board on remand from the U.S. Court of Appeals for the Sixth Circuit with directions to the Board to "articulate and apply recognized principles of agency law before [asserting] jurisdiction over an entity it concludes acts as an agent of the union or employer." (6th Circuit slip op. at 5). The parties filed position statements with the Board in July, 2008. In her position statement to the Board, counsel for the General Counsel relied on a previously unasserted alternative theory. The Nashville Electrical Joint Apprenticeship Training Committee ("JATC") is filing this supplemental statement of position in response to the Board's April 16, 2009 invitation to address the General Counsel's alternative theory.

The General Counsel's Alternative Theory

The General Counsel's alternative theory is taken from decisions of the U.S. Courts of Appeals that issued after the Supreme Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). The Supreme Court had held in *Amax Coal* that a trustee of a pension fund appointed by the employer was not an agent of the employer for purposes of collective bargaining, but rather a fiduciary "whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him." 453 U.S. at 334. In subsequent decisions, some of the

U.S. Courts of Appeals stated that actions by such trustees nevertheless could be attributed to the party that appointed the trustee – in these cases, the union – in three factual situations:

> 1. Where the provisions of the collective bargaining agreement remove the discretion from the trustees to administer the trust funds solely for the benefit of the employees or the trust fund;
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> 2. Where the trustees' actions were in fact directed by union officials – the *de facto* control theory; or
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> 3. Where the trustees' actions were undertaken in their capacities as union officials rather than as trustees – the "union hat" theory.

See NLRB v. Truck Drivers Local 449, 728 F.2d 80, 89 (2d Cir. 1984); *Griffith Co. v. NLRB*, 660 F.2d 406, 410 (9th Cir. 1981).

Counsel for the General Counsel expressly relies on the *de facto* control theory under the heading: "Even if the JATC is a Nominally Independent Entity, the Union is Liable Based on its Actual Control of JATC Actions Against Page." (General Counsel's Position Statement to the Board on Remand ("GC P.S."), p.16). However, counsel for the General Counsel also contends that "the Union-appointed members

used their JATC positions to advance the Union's interest in dues collection and that they instigated the JATC's actions against Page on that basis," which suggests she is relying on the "union hat" theory. (GC P.S., p.3). As shown below, the facts do not support either theory, and accordingly, the Board should dismiss the complaint.[1]

Relevant Facts

In the instant case, the JATC's director, Elbert Carter, recommended to the union- and employer-appointed Committee members that Page be rotated from his father's company to another employer. Carter testified that he took this action because Page had only worked successfully for his father's company and had previously had problems working for two other employers, which in each case had led to his termination. (6th Circuit slip op. at 2; D&O at 1, 9; Tr. 38/4-13, 160/23-161/2, 302/2-16; JATC-17, JATC-18, JATC-21, JATC-22, JATC-23, JATC-24, JATC-25). Before Page "graduated" from the apprenticeship program, Carter wanted to be certain he was prepared

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[1] Counsel for the General Counsel does not rely on the first theory – that the collective bargaining agreement removes discretion from the Committee members to act to administer the apprenticeship program independently – nor could she given the facts of the instant case. The collective bargaining agreement grants the JATC full authority and discretion to administer the program (D&O at 8; *see, e.g.*, JATC-3 at p.17 § IIIE).

to work successfully outside the protection of his father. (6th Circuit slip op. at 3; D&O at 9; Tr. 54/9-57/18, 454/12-456/23, 477/14-478/5). Carter testified without contradiction that he was unaware that Page was behind in his union dues at the time he recommended that the Committee rotate Page. (D&O at 2; Tr. 126/20-127/10; JATC-10). The Committee members agreed with Carter's recommendation and voted unanimously to rotate Page. They all testified that Page's dues delinquency played no part in their decision. (6th Cir. slip op. at 3; D&O at 4; Tr. 126/20-127/10, 202/4-13, 206/20-23, 456/12-23, 469/17-470/2).

Thereafter, Carter sent letters to Page and to his father's company, stating that Page was being rotated to other employment. (D&O at 2; Tr. 58/13-16, 77/4-9, 97/3-5; GC-7, GC-8 (Letters)). Carter's letter directed Page to contact the JATC office as soon as possible. (GC-8). Page did not respond to the letter. (D&O at 2; Tr. 316/17-19). Under the apprenticeship agreement between the JATC and Page, Page is subject to Carter's direction. (JATC-3 at pp.19, 25-26 (Apprenticeship Standards incorporated into Page's Apprenticeship Agreement – JATC-7)).

The Committee met with the owners of Elec-Tech on July 24, 2002. The owners presented their reasons for opposing Page's rotation.

(D&O at 2; Tr. 85/6-86/6, 234/10-235/7). During the meeting, Page's father stated repeatedly that, or asked repeatedly if, the rotation decision was about dues, and finally one of the employer-appointed JATC members, Bert Noll, snapped that, yes, it was about dues and other policies and procedures that Page had agreed to and broken. (D&O at 4, 11; Tr. 398/7-401/21, 86/7-87/12, 234/9-236/2). Page's father admits that in response to Noll's outburst, union-appointed Committee member Jerry Lee said, "no, it is not. This is a right-to-work state. It is not about union dues." (Tr. 235/8-236/2). And, another of the owners of Elec-Tech testified that he did not understand Noll to mean that the decision was in fact because of the dues delinquency. (Tr. 406/1-407/6). Ultimately, the JATC members voted unanimously to rescind the decision to rotate Page. (D&O at 2; Tr. 192/16-193/16; JATC-11).

After meeting with the Elec-Tech representatives, the JATC members met with Page. (D&O at 2; Tr. 87/13-89/15, 211/24-213/18). The purpose of the meeting with Page was to find out why he had not responded to the Committee's directive in its July 11, 2002, letter that he contact the JATC office. (Tr. 87/20-23, 318/10-20; GC-8). At the beginning of the meeting, the Committee asked Page why he had not responded to the July 11, letter. (Tr. 87/15-88/5, 318/10-20). Page said that an NLRB agent and U.S. Department of Labor Bureau of

Apprenticeship and Training ("BAT") State Director Nathaniel Brown had told him that he did not have to. (D&O at 2; Tr. 88/1-8, 211/24-212/15, 439/12-18; JATC-11). The JATC then ended the meeting. (D&O at 2; Tr. 88/1-8, 439/12-18). Carter then called the NLRB agent and Brown to ask what they had told Page regarding his communication with the Committee. As the Board and the Court found, "both [the NLRB agent and Brown] denied that they had made the statements Page attributed to them." (6th Cir. slip op. at 3; D&O at 2; Tr. 88/15-89/2, 212/18-213/3, 439/19-440/21).

The JATC held another meeting with Page the following day, July 25, 2002. At that meeting, Carter told Page that he had contacted both the NLRB agent and BAT Director Brown, and both had advised Carter that they had not told Page that he did not have to respond to the Committee. (Tr. 89/10-92/4). Page said that he had contacted them as well and had confirmed that he did not have to talk to the Committee unless he chose to. (Tr. 91/1-7). The Committee ended the second meeting, and Carter again contacted the NLRB agent and Brown, and asked that they attend a meeting of the Committee on July 31, 2002. (Tr. 91/10-93/15).

On July 31, 2002, the Committee again met with Page – this time in the presence of BAT Director Brown. (D&O at 2; Tr. 92/3-93/3,

213/19-214/4). Carter asked Page if Brown had in fact told him that he did not have to respond to the Committee, and Page did not answer. Brown then instructed Page to respond to the JATC if he wanted to continue in the apprenticeship program. (D&O at 2; Tr. 93/1-12, 213/19-214/4, 420/11-22). Page admits that the Committee members told him during the July 31 meeting that they felt he had "disobeyed them and not come under them ... That I did not respond to the July 11th letter to rotate, and ... that I had lied to them about my conversations with Nathaniel Brown and the NLRB." (Tr. 334/14-335/2).

The JATC met on September 4, 2002, and decided to discipline Page for failing to cooperate with the Committee by ignoring its directive in the July 11th letter that he contact the JATC office and for lying to the Committee regarding his conversations with NLRB and BAT representatives. (D&O at 2; Tr. 261/25-262/10, 215/2-17, 221/21-222/5, 380/3-13). As State BAT Director Brown testified, both are legitimate reasons for disciplining an apprentice. Tr. 432/4-13). The Committee disciplined Page by delaying his next scheduled wage increase and his completion of the apprenticeship program by six months. (D&O at 2; Tr. 99/11-101/2).

Discussion

I. There is No Evidence that the Union Controlled the JATC

To establish that the union had *de facto* control of the JATC, the General Counsel has to establish actual control.[2] *NLRB v. Truck Drivers Local 449*, 728 F.2d at 87-89. The General Counsel therefore must show that the union controlled the Committee members when they voted to rotate apprentice Daniel Page and later voted to discipline him. *Id.* at 88 ("'the Board has not demonstrated that the Union controlled the Trust when the trustees voted to [take the action at issue]'" (quoting *NLRB v. Driver Salesmen Local 582*, 670 F.2d 855, 858 (9th Cir. 1982)).

Counsel for the General Counsel states: "The decision against Page was ... initiated, recommended, and dominated by Union members/officials." (GC P.S., p.18). That statement is patently wrong. The recommendation to rotate Page was made by JATC Director

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[2] At one point in her brief, counsel for the General Counsel incorrectly refers to the union's "actual control and involvement" in the actions taken. (GC P.S., p.16). Showing that the union committee members were involved in the actions taken obviously cannot support the *de facto* control theory, which requires a showing of actual control and not mere involvement. Of course the union Committee members were involved in the decisions at issue – they were involved as JATC Committee members.

Carter, who is not a union official. (Tr. 26/20-24, 27/6-7). Carter was appointed the Director of the JATC jointly by union and management representatives. (Tr. 27/8-11).[3] He happens to be a member of the union, but he does not hold any office or leadership position in the union. In fact, Carter was a contractor for twenty-two years before he began serving as Director of the JATC. (Tr. 127/11-21). Without a showing that the union directed and controlled Carter's actions, his actions cannot be attributed to the union. *ILA v. NLRB*, 56 F.3d 205, 213 (D.C. Cir. 1995). *See also General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 393 (1982).

Moreover, the actions at issue here were made by vote of the JATC Committee members – both union-appointed and employer-appointed Committee members. The unanimous vote to rotate Page was made by those Committee members present – one employer-appointed and two union-appointed Committee members. (Tr. 29/25-30/21, 54/9-25, 192/15-23). The General Counsel incorrectly suggests (GC P.S., p.18) that because two union-appointed Committee members

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[3] Carter testified that he was appointed to his position as director of the JATC by the CIR. The CIR stands for the Congress on Industrial Relations, which is a joint labor-management organization that serves as a forum to resolve labor disputes between the IBEW and the National Electrical Contractors Association – an employer association. *See www.thecir.org.*

were present and only one employer-appointed Committee member, the decision was dominated by the union. The record clearly establishes, however, that regardless of how many Committee members are present for each "side" at a meeting, the union and the employers have an equal number of votes. The Apprenticeship Standards that govern the JATC clearly state: "Each sponsoring party [the employer and the union] shall have a total number of votes at JATC meetings equal to its allowable number of JATC members ... regardless of the number of members present." (JATC-3 at p.7, ¶C (emphasis supplied); Tr. 455/8-13).

Moreover, the subsequent decision to discipline Page for his failure to cooperate with and lying to the JATC was made by the full Committee by unanimous vote. (Tr. 99/9-18). The Committee members felt that Page had not told the truth when he claimed to the Committee that an NLRB agent and the BAT Director had told him that he did not have to answer to the Committee. (Tr. 203/9-13 (employer member Noll), 215/2-8 (Noll), 222/1-5 (Noll), 262/1-5 (Noll), 380/9-13 (union member Lee), 508/8-509/23 (employer member Greer)).

The employer-appointed and the union-appointed Committee members alike testified that dues had nothing to do with their votes to rotate and to discipline Page. (D&O at 4; Tr. 107/12-21, 206/20-23,

215/2-17, 126/20-127/10, 202/4-13, 206/20-23, 456/12-23, 469/17-470/2, 492/8-10, 493/22-494/7, 496, 498, 507/13-15, 508/2-17). The employer-appointed and the union-appointed Committee members also testified that the union did not have any control over their votes or actions as JATC Committee members. (Tr. 218/2-12, 298/18-299/11, 381/22-382/16, 441/7-8, 451/8-14, 469/5-14, 492/11-18, 507/16-21, 510/7-9).

Counsel for the General Counsel states without citing any record authority: "Lee, Grant, and Hooper [three of the union-appointed Committee members] view their JATC roles and union roles as overlapping and use their JATC positions over apprentices to further the union's goals of increasing membership and collecting dues." (GC P.S., p.6). The record does not support that statement. In fact, the only specific record evidence to which counsel for the General Counsel can point is Grant's response to a leading question that it is his job as a Committee member is to encourage apprentices to be IBEW members. (GC P.S., p.6). That evidence certainly is not sufficient to show union control of the JATC.

Counsel for the General Counsel also points to the fact that JATC Director Carter, who generally is in daily contact with apprentices who come to the JATC to attend training, reminds those apprentices who

are members of the union when they are behind in their dues payments and that the union periodically tells Carter which apprentices are in arrears. Carter testified that reminding the apprentices to pay their union dues is voluntary on his part. (Tr. 33/8-17). Therefore, it cannot serve as evidence of union control. Carter does not collect dues on behalf of the union. On one occasion, Carter took Page to the union's office so that the union officers could explain to Page the union benefits he would forfeit if he let his membership lapse.[4]

Of the *de facto* control cases counsel for the General Counsel cites, the most analogous is *NLRB v. Truck Drivers Local 449*, 728 F.2d 80 (2d Cir. 1984), in which the court found that the Board had not shown that the union controlled a trust fund. In that case, the collective bargaining agreements did not mandate pension contributions on behalf of casual employees. On union stationary, a union business agent who was also a union-appointed trustee nonetheless sent the participating employers stipulations signed by the fund trustees and the union requiring contributions on behalf of casual employees. The employers refused to sign the stipulations, and the fund trustees then refused to accept any contributions from them,

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[4] Page admitted that as they left the meeting, Carter told him he did not have to be a union member.

which the Board found was unlawful coercion in violation of Section 8(b)(3). The Board found that the union and the fund trustees were acting in concert with one another because both had demanded that the employers sign the stipulations, their actions were intertwined, and both were pursuing the union's interests. On that basis, the Board found that the trust fund had acted as the union's agent.

The court disagreed, stating: "the crucial question when determining an agency relationship in this context is not whether the union goals and trust fund goals correspond, but rather whether the trust fund has illegally injected itself into the collective bargaining process by taking one side's bargaining goals and unilaterally forcing them upon the other." *Id.* at 87. Noting that the employer-appointed trustees had voted with the union-appointed trustees to require payment on behalf of casual employees, the court held that the Board had not shown that the union controlled the trust when the trustees voted to implement the decision.

The same can be said here. All the decisions at issue here were made jointly by the employer-appointed and the union-appointed Committee members. There has been no showing that the union

somehow controlled the votes of the employer-appointed Committee members. Absent such a showing, the *de facto* control theory must fail.

In any event, *Truck Drivers Local 449* presents a closer case. There, the trustees took action that was initiated by a union officer and that conflicted with the requirements of the collective bargaining agreement. Here, the action was initiated by the JATC director who was not a union officer and the actions – all taken by joint vote of the JATC Committee members – were in accord with JATC standards and goals.

Counsel for the General Counsel cites three additional *de facto* control cases. *Jacob's Transfer, Inc.*, 227 NLRB 1231 (1977) – a case that pre-dates the Supreme Court's decision in *Amax Coal* – concerned whether the union and the health and welfare trust funds had unlawfully rejected an employer's proffered contributions under a compliance agreement the employer had entered into to remedy a previously found unfair labor practice. The Board seemed to hold in part that the trust funds are agents of both the employer and the union because they were created by the parties' collective bargaining agreement (*id.* at 1231) – a holding that cannot stand in the wake of *Amax Coal* and the Sixth Circuit's decision in the instant case. The

Board also found that the union president had directed each trust to reject the contributions and that the trustees had then given conflicting, clearly pretextual reasons for rejecting the contributions. Based on that finding, the Board held that the union violated the Act by causing the trusts to reject the contributions. The Board's decision concerning the actions taken by the trust in *Jacob's Transfer*, seemed to turn on the conclusion that Supreme Court rejected in *Amax Coal*, and not on a finding of *de facto* control. In any event, the case is readily distinguishable from the instant case, because in *Jacob's Transfer*, there was clear evidence that the union directed the trusts' actions, whereas here, there is no evidence that the union directed Carter or the Committee members to take any action against Page.

The final two *de facto* control cases cited by counsel for the General Counsel each concerns a claim that the union had violated Section 8(b)(3) by failing to provide information in the possession and control of benefit trust funds. Those cases actually support the respondents and not the claims of counsel for the General Counsel.

In *UFCW Local 1439 (Layman's Market)*, 268 NLRB 780 (1984), the employer's attorney wrote to the union and requested financial reports of the union's proposed health and pension plans and also

detailed information about the plan participants. The union president, who was a trustee of three of the four funds, directed the union's secretary treasurer to respond to the employer's requests by advising that the requested information could be obtained by contacting the administrator of the funds. The Board rejected the ALJ's finding that the union had an affirmative duty to demand that the trust administrator provide the information and instead found no violation, noting that there was no evidence that the union was in *de facto* control of a nominally independent trust fund.

In *National Union of Hospital Employees Local 1199E (Johns Hopkins Hospital)*, 273 NLRB 319 (1984), the employer wrote to the union requesting information regarding a benefit fund. The union forwarded the request to the fund. The fund provided some of the information, but refused to provide other information, which the trustees had voted to keep confidential. The Board refused to hold the union liable for any action or inaction by the fund. The Board noted that in a previous case – *National Union of Hospital Employees (Sinai Hospital)*, 248 NLRB 631 (1980) (discussed below) – it had held the union liable when the fund director refused to supply the employer with requested information. The Board further noted, however, that in *Sinai Hospital*, the action at issue was taken by the fund's director who

also was a union officer. In contrast, in *Johns Hopkins Hospital*, the fund's director was not a union officer, and the decision to keep the information confidential had been made at the initiative of the employer-appointed trustees.

In both *Layman's Market* and *Johns Hopkins Hospital*, the Board found no violation because the General Counsel could not show that the unions controlled the trustees' actions. The same is true in the instant case. In the instant case, the JATC Director, who was not a union officer, made the recommendation to rotate Page, and the decisions to rotate and discipline Page were made by the Committee members. There is no evidence that the union controlled the Committee's decisions.

II. There is No Evidence that the JATC Committee Members' Actions Were Made in Their Capacities as Union Officials

The only actions that may be considered under the "union hat" theory are the actions of union officials – to take action wearing a union hat, one must possess a union hat. Director Carter was merely a union member and not an official of the union, and therefore his actions may not be considered under the union hat theory. The actions that may be considered are those of the union-appointed Committee members who

also held union offices. In the instant case, all the actions taken against Page were made by vote of employer-appointed and union-appointed trustees, and the reasons asserted for the actions taken were facially reasonable and lawful. Therefore, the "union hat" theory fails to support the alleged violations.

In addition, the "union hat" cases cited by counsel for the General Counsel are readily distinguishable. In *NLRB v. Laborers Local 1140*, 577 F.2d 16 (8th Cir. 1978), the court had ordered the union on two prior occasions to refrain from engaging in unlawful secondary activity. At issue was whether the union could be held in civil contempt for unlawful secondary picketing engaged in by a single union-appointed fund trustee who also was the union's business manager and secretary-treasurer. The union trustee picketed with signs stating that he was picketing to enforce fund contribution requirements, although the only deficiency was the failure of two employers to post a required bond. The employers had not been advised of their deficiencies before the picketing. The court upheld the special master's finding that the union trustee was not acting as a trustee but rather was acting as a union agent.

In *Sinai Hospital*, 248 NLRB 631 (1980), before collective bargaining negotiations, the hospital sent an information request to the executive director of the fund who was also a vice president of the union. The executive director declined to supply the information and had no legitimate business justification for declining to supply it. The Board concluded that he was acting with "a union voice."

Finally, in *SEIU Local I-J (Shor Co.)*, 273 NLRB 929 (1984), the union president, who was also the fund administrator, sent a letter on fund stationary to an employee who had filed a decertification petition, stating that it had come to the fund's attention that she might not be a union member and that beginning the following month, she would no longer be covered by the health and welfare plan. There was no legitimate basis for the letter, and thereafter the fund administrator wrote again, stating that her benefits had been restored. The Board held that the fund administrator had acted to further the union's interests in his capacity as union president and not as the fund's administrator.

In all three "union hat" cases counsel for the General Counsel cites, the conduct at issue was engaged in by a renegade fund trustee or administrator who was also a union official, and the union official had

no legitimate business justification for his conduct. In contrast, in the instant case, the JATC Director, who was not a union official, made the recommendation to rotate Page. The decisions to rotate and to discipline Page were not made by a sole trustee or administrator wearing a union hat, but were made by joint vote of employer-appointed and union-appointed Committee members. In addition, in the instant case, the actions were based on legitimate business justifications. Therefore, the facts in the instant case do not support the "union hat" theory.[5]

CONCLUSION

As shown above, the record and the case law do not support counsel for the General Counsel's alternative theory. For the foregoing reasons, and for the reasons set forth in the JATC's previously filed brief on remand, the complaint should be dismissed.

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[5] Counsel for the General Counsel also cites *Local 3, IBEW (L.M. Ericsson Telecom.)*, 257 NLRB 1358 (1981), but that case does not support her alternative theory. In *Ericsson*, the parties to the collective bargaining agreement were granted and exercised control over the joint board at issue in that case. *Id.* at 1369 n.30. Here, the collective bargaining agreement grants sole authority and discretion to the JATC to administer the apprenticeship program and does not grant the employer association and the union control over the JATC's actions.

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NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 429, AND ITS AGENT NASHVILLE ELECTRICAL JOINT APPRENTICESHIP TRAINING COMMITTEE (JATC)

Respondent

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the Brief for the Nashville Electrical Joint Apprenticeship Training Committee (JATC), were served by electronic mail, this 7th day of May, 2009, on the following:

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